

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 219 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH
and
Hon'ble MISS JUSTICE R.M.DOSHIT

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

DARBAR NAUGHAN SHARDUL

Versus

STATE OF GUJARAT

Appearance:

MR ND NANAVATI for Petitioners
MR SP DAVE, APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH
and
MISS JUSTICE R.M.DOSHIT

Date of decision: 21/03/2000

ORAL JUDGEMENT

1. Present conviction appeal is directed against impugned judgment and order dated 17/3/1990 rendered by the Ld. Addl. Sessions Judge, Junagadh in Sessions Case No. 39 of 1986. The three appellants, hereinafter referred to as 'the accused persons or the respective accused' came to be convicted for the offences punishable u/Ss. 302 and 326 read with section 34 of the Indian Penal Code (for short 'IPC') and sentenced to undergo life imprisonment for the first part of the offences and rigorous imprisonment for a period of three years coupled with fine of Rs.200/-, in default to suffer simple imprisonment for one month for the second part of the offences.

2. Briefly stated prosecution case is : At around 8 O'clock at night one Hanu Panchu and Atu were beaten by the accused persons Naughan Shardul, Baba Shardul and Jalam Jasa who happened to be the occupiers of nearby field. Upon receipt of such an information from his elder brother's son Khodu, complainant Lakhman Bhura went to the site and found that his son Hanu was bleeding from his head and was not speaking. Atu and Panchu were also bleeding from their respective heads and all the three were lying in the field. Panchu informed the complainant and the persons who reached there that accused Naughan Shardul gave axe blows on the heads of all the three victims, accused Baba gave blows with the blunt portion of spear and accused Jalam Jasa gave blows with the hunter (stick with iron ring) and the three accused persons had escaped. That is how the victims were required to be taken to the Government dispensary for treatment. The reason why the victims were beaten was stated to be enmity on account of a fight which ensued between the parties around a year before the date of the incident. This prosecution case emanates from complaint exh. 5 given by Lakhman Bhura on 28/11/1985 at 2.45 hours during night time. It would appear that since Hanu was serious the medical officer at Una advised him to be taken at Ahmedabad. As all the three victims were injured, they were taken to Ahmedabad. After passage of one day Hanu died on account of the injuries he sustained. As Atu Arjan sustained serious injuries he was confined in the hospital for longer duration. P.S.I. Shankarbhai Shanabhai Rathod, P.W. 16 Exh. 57 attended to the investigation and upon he having collected the evidence, submitted the charge-sheet. The matter went before the Ld. Addl. Sessions Judge upon its committal for trial. All the three accused persons pleaded not guilty and canvassed self defence for being exonerated of the charges levelled against them. After hearing the learned advocates appearing for the accused persons and

Ld. Public Prosecutor, Ld. Addl. Sessions Judge rendered conviction and order as aforesaid. That is how the accused persons were before this Court in this appeal. It would appear that accused no. 3 Darbar Jalam Jasa died during the pendency of this appeal and the appeal will obviously abate in so far as he is concerned, particularly bearing in mind the fact that the matter has been heard in so far as the rest of the two accused persons are concerned.

3. When the matter came up for final hearing before this Court after reading the evidence adduced before the Ld. Addl. Sessions Judge as also the judgment it was submitted by the Ld. counsel appearing for the accused persons that the offence that could be briefly and properly attributed to the accused persons would be at best u/S. 304 of the IPC and not 302 thereof. Mr. S.P. Dave, Ld. A.P.P. supported the conclusions saying that the injuries sustained by the victims were such that only offence that could be attributed to the accused persons would be section 302 read with sec. 34 of the IPC. We have focussed our attention to this limited question which arises for our consideration in this appeal. However, before we do that, we make a synopsis of evidence adduced in this case.

P.W. 1 Dr. Mrudulaben Ramniklal has been examined at Exh. 25. She was the first doctor to attend to the victims who sustained injuries. She also had an occasion to give information to the police about the victims sustaining injuries on account of some fight. It might be noted from the evidence of this witness that the deceased had one external injury on the head and the second injury was consequential injury. Another victim Atu Arjan had also head injury as described by this witness. Third victim Pancha Arjan sustained injury on the left side of the forehead resulting into fracture into frontal bone. In her cross-examination she has in terms stated that the relatives who accompanied the victims informed that the victims sustained injuries during the course of fight.

P.W. 2 Dr. Ashok Dinkarraai Pandya, Exh. 29 has been examined as he had the occasion to attend to the victims when they were brought to the Civil Hospital, Ahmedabad.

P.W. 4 Dr. Narendra Kanjibhai Desai, Exh. 43 has been examined for the injuries sustained by other victim persons Baba Shardul and Dhiru Arjan.

P.W. 14 Dr. Sunilkumar Madanlal Lad, Exh. 65 performed post mortem on dead body of Hanubhai Lakhman, the victim who died of the injuries.

All that is with regard to medical evidence.

P.W. 3 Lakhmanbhai Bhurabhai, the complainant has been examined at Exh. 37.

P.W. 5 Dhirubhai Arjanbhai, Exh. 45 is one of the injured witnesses in so far as the first incident is concerned.

P.W. 6 Panchu Arjanbhai, Exh. 46 is the injured in so far as the second incident is concerned.

P.W. 7 Khodu Sidi, Exh. 47 is the witness who had given the information to the complainant.

P.W. 8 Suleman Juma and P.W. 9 Jinatben Jumabhai respectively Exhs. 48 and 49 were presented as eye witnesses, but ultimately turned hostile.

P.W. 10 Jivabhai Jethabhai, Exh. 50 happened to be the head constable who recorded the first information.

P.W. 11 Alarakha Husen, Exh. 54 has been examined in respect of the F.I.R. Exh. 55 given by the complainant Lakhman Bhurabhai.

P.W. 12 is the injured witness Atu Arjanbhai, Exh. 60 who sustained injuries in the second incident.

P.W. 13 is the Panch witness Yusuf Husen, Exh. 61.

P.W. 15 Shankarbhai Sanabhai Rathod, P.S.I. happened to be the Investigating Officer and he has been examined at exh. 67.

4. It is not in dispute that there were two incidents which provide the fabric to the prosecution story. Both the incidents surface in the prosecution evidence itself. The facts as have been stated by P.W. 7 Khodu Sidi exh. 47 will assume importance to an extent. According to him when he returned home after attending to his labour work he heard that Bai Nathu, wife of Jodhu was hurling abuses aimed at him and Lakhman. She was so abusing because she suspected this witness and Lakhman having talked about Bai Nathu having beaten her husband Jodhu. He, therefore, went to the house of his uncle Lakhmanbhai and told him that they were wrongly named in the episode. Lakhmanbhai advised him to go home saying that if resolution of such a dispute was to be arrived at, it might be done when the persons of other party would approach them. The witness then went to the house of Jodhu Lakha. Posing for a moment here, it may be noted that there was no reason for the witness to go to the house of Jodhu Lakha, husband of Bai Nathu and yet the witness went there and said that their names should not be falsely taken. When the witness was on his way to his field where his brother Bala and Dhirubhai were attending to the work there, he heard the call of his brother Bala Sidi seeking to run.

When he asked Bala why he was calling for help, he informed him that when they were sitting nearby the hedge of the field and smoking, accused persons reached there and asking why they were sitting there, they assaulted them with hunter. That is how the first incident came to be introduced by this witness. What is important to be noticed from this part of the evidence given by the witness in the examination in chief is that the persons belonging to the complainant party were concerned in respect of the episode with regard to some disputes/quarrels between Bai Nathu and her husband Jodhu Lakha. It is an admitted fact that Bai Nathu happens to be the sister of accused persons. It is not made clear in the whole of the prosecution case as to whether this reason precipitated when the first incident occurred. What is important to be noticed is that upon receipt of the information from Bala Sidi about the first incident the witness, Atu Arjan, Hanu Lakhman and Panchu Arjan rose up and went to reprimand accused persons. Immediately thereafter the witness has described the assault launched by the accused persons on these four persons and resultant injuries sustained by the victims, namely Atu Arjan, Hanu Lakhman and Panchu Arjan. All the four persons including the present witness happened to be quite young persons and there could not be any reason for them to reprimand the accused persons. However, it will be soon noticed from the evidence of the other witnesses that the cause for approaching the accused persons on the occasion of second incident was the one which could be visualised from the first part of the evidence of this witness. It has appeared in his cross-examination that he was not amenable to advice of his uncle Lakhmanbhai Bhurabhai that if the dispute was to be resolved, the persons of the accused party might themselves go to the persons of the complainant party and he should go home and yet he went to the house of Jodha Lakha for scolding him.

5. It may be noted that Bala Sidi has not been examined, but P.W. 5 Dhirubhai Arjanbhai Exh. 45 has described the first incident thus : when the witness was in his field in the company of Bala Sidi at around 8 O'clock at night on the day of incident, he and Bala Sidi were smoking nearby the hedge of the field, at that time the accused persons reached there. Accused Bala Shardul had spear in his hand, accused Naughan Shardul had axe in his hand and accused Jalam Jasa had hunter in his hand. Asking why they were sitting at that hedge of the field, accused Jalam Jasa gave hunter blow on the back of Bala Sidi and on the hand of this witness. They then left towards field of Jodhu Lakha and the witness left the

place. He admitted that he did not go to the dispensary on that day, but had taken treatment on the next day. He has also deposed that two years before the date of incident accused Jalam jasa had an occasion to file complaint against the persons of the complainant party and that was settled in the Court at Una. Bearing in mind the weapons attributed to the accused persons even if the incident has been accepted as occurred as deposed to by this witness, the accused persons did not have the occasion to cause any serious injury to this witness or Bala Sidi. In fact even after giving hunter blows accused persons had the occasion to leave the place. This would reflect lack of intention on the part of accused persons to cause death of the persons belonging to the complainant party. Even after the other 4 persons came to know about first incident, there was no reason for the said 4 persons to approach the accused persons and that too for the purpose of reprimanding them. Yet they did what they ought not to have done. That is how the second incident.

6. P.W. 12 Atu Arjan who came to be seriously injured in the incident has been examined at Exh. 60. His evidence deserves consideration for the purpose of deciding the nature of the offence which could be attributed to the accused persons. Reiterating the facts with regard to how Atu Arjan and other 3 persons as aforesaid had an occasion to go to reprimand the accused persons the witness has deposed that they met the accused persons near the hedge of the field and they asked them to accompany them for the resolution of their suspicion with regard to the persons of the complainant party talking about the dispute between Bai Nathu and her husband. This is how the witness has said in his examination-in-chief :-

He has then deposed that on so saying, accused Jalam Jasa abused Hanu Lakhman and Hanu Lakhman counter abused Jalam Jasa. Thereupon Jalam Jasa gave hunter blow on the head of Hanu Lakhman and Naughan Shardul gave axe blow on the head of the witness. Accused Jalam Jasa also gave hunter blow to Panchu. The witness became unconscious. This is in short the incident narrated by the witness in his examination-in-chief. The cause with regard to clearing of the suspicion which the accused persons harboured against the persons of the complainant party has been elaborated in the cross-examination. What is important to be noted therefrom is that the occurrence of the second incident does not appear to be the direct consequence of the alleged occurrence of the first

incident. Be that it may, even according to the prosecution case as appearing in the evidence of this witness there was no immediate assault by the accused persons upon the witness and his 3 companions at the time of the incident. There clearly appears to be some interaction on the aforesaid cause and then, as admitted by the witness in his cross-examination, there was a free fight between the two parties.

7. It has been submitted by the Ld. A.P.P. that the accused persons were armed with deadly weapons; whereas there is no evidence with regard to aforesaid 4 persons of the complainant party having been armed at the time of the incident in question. True it is that the accused persons have not led any evidence in support of their case of self defence. However, it is a fact that there was a free fight between the two parties during the course of the second incident. It has appeared in the prosecution evidence itself that there was stone throwing. As a matter of fact it has been consistently suggested by the defence in the cross-examination of the concerned witness that even present witness and 3 companions were armed with stick. Learned counsel for the accused persons rightly drew our attention to the young age of the 4 persons of the complainant party who had gone to reprimand the accused persons. All these circumstances would assume importance while assessing the evidence for finding out what would be the nature of offence that can be attributed to the accused persons. At this very stage medical evidence concerning the injuries sustained by the accused persons might be recalled. P.W. 4 Dr. Narendrabhai Kanjibhai Desai exh. 43 has spoken to such injuries. He had the occasion to examine accused Jalam Jasa on 1/12/1985. He noticed wound admeasuring 1" x 1/3" bone deep on the right side of the forehead above eye brow and small wound on the right little finger admeasuring 1/3" x 1/8". It is true that the injuries sustained by accused Jalam Jasa appeared to be trivial in nature as rightly observed by the Ld. Addl. Sessions Judge. At the same time it can hardly be said that such injuries could be caused by either fist blows or exchange of hands without use of any weapon. Possibility of use of stones or sticks which ordinarily the farmers keep with them cannot be totally ruled out. Otherwise there could not have been free fight at the time of the second incident as admitted by the prosecution witnesses.

8. We might at this stage refer to the evidence of Jinatben Jumabhai P.W. 9 exh. 49 although she has turned hostile to the prosecution. In her

examination-in-chief itself she has referred to the incident in this manner. Accused persons had been to the house of their sister Bai Nathu. Persons of the complainant party, namely Atu, Hanu and Panchu were in their front. According to this witness they were quarreling at the time of the incident. We feel that although the witness turned hostile to the prosecution this part of her evidence appears to be quite consistent with the other parts of the prosecution evidence as noted hereinabove. In our considered opinion the circumstances so noted from the aforesaid evidence would clearly go to indicate that there is no detailed investigation with regard to the cause of incident in which Hanu died of the injuries caused by accused persons as aforesaid and Atu and Panchu sustained serious injuries. There was free fight between the two parties at the time of such incident and use of the weapons by the accused persons not in their natural manner (axe appears to have been used from its blunt side and spear appears to be used by wielding it) as can be seen from the medical evidence itself. Free fight clearly appears to have occurred between the two parties at the time of incident. If that is so, exception no. IV to Section 300 of the IPC surfaces and the accused persons can legitimately point at operation of section 304 of the IPC. If that is so, their conviction would deserve alteration from section 302 read with section 34 to one u/S. 304 of the IPC.

9. Learned counsel for the accused persons made efforts to submit that case set out in the F.I.R. cannot be said to have been established and failure on the part of the prosecution to bring home the whole story will enure for the purpose of giving benefit of doubt to the accused persons. He, therefore, prayed for the acquittal of the accused by not applying section 34 of the IPC as also by not applying the substantive provisions thereof. However, he fairly, in the alternative, submitted that present case would squarely fall under the provisions of sec. 326 and at best u/S. 304 of the IPC both read with sec. 34 thereof. In that view of the matter, following order is required to be passed :-

This appeal is partly allowed. The conviction and sentence of the accused persons u/S. 302 read with sec. 34 of the IPC is altered to conviction u/S. 304 read with sec. 34 of the IPC. Their sentence under the said count is altered from life imprisonment to the imprisonment undergone so far as substantive sentence is concerned. However, they are directed to pay fine in the sum of Rs.5,000 (Rupees five thousand only) each (inall

Rs.10,000/-). At the request of Mr. N.D. Nanavati, learned counsel appearing for the accused persons, they are granted time upto 28/4/2000 for depositing that amount in the trial Court. In case they commit default in depositing/paying the amount of fine, they will further undergo rigorous imprisonment for a period of one year.

Out of the fine, if deposited, a sum of Rs.5,000/- (Rs.2,500/- each) will be paid over to injured witness Atu Arjan and the rest of amount, namely Rs.5,000/- will go to State.

Rest of the impugned order concerning conviction and sentence u/S. 326 read with sec. 34 of the IPC will stand.

The accused persons shall be set at liberty forthwith if they are not required for any other case. However, they shall be taken into custody if they commit default in the payment of fine as aforesaid.

* * *

PVR.